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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 60

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (R. 17) is reported at 244 F. Supp. 955. The report of the Interstate Commerce Commission (R. 795) appears at 322 I.C.C. 301.[1]

JURISDICTION

This was a proceeding before a three-judge federal district court under 28 U.S.C. 1336, 2284, 2321–2325 to set aside orders of the Interstate Commerce Com-

[1] A copy of the report is bound into the record at R. 795.

mission promulgating certain rules. The final judgment of the district court (R. 44) was entered on August 20, 1965. On October 18, 1965, the United States and the Interstate Commerce Commission filed a joint notice of appeal (R. 50). This Court noted probable jurisdiction of the appeal on April 18, 1966 (R. 54, 384 U.S. 902). The jurisdiction of this Court to review the judgment below on direct appeal rests on 28 U.S.C. 1253 and 2101(b). *United States* v. *Drum,* 368 U.S. 370; *Dixie Carriers, Inc.* v. *United States,* 351 U.S. 56.

QUESTION PRESENTED

Whether the Interstate Commerce Commission acted within the lawful scope of its authority in ruling (1) that railroads which offer "piggyback" (trailer-on-flatcar) service to the shipping public must offer it on the same terms to motor carriers; and (2) that, subject to certain restrictions, motor carriers are entitled to utilize rail piggyback service in the performance of their authorized service.

STATUTE AND RULES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, 1001, 1231, and Sections 1(4), 2, 3(1), 12(1), 216(c) and 402(a)(5) of the Interstate Commerce Act, 49 U.S.C. 1(4), 2, 3(1), 12(1), 316(c), and 1002(a)(5); and Interstate Commerce Commission Rules 500.1–500.3; 49 C.F.R. 500.1–500.3 (Supp. 1966), are printed in the Appendix, *infra,* pp. 69–75.

STATEMENT

This case involves the legality of two of the basic rules that the Interstate Commerce Commission has prescribed to regulate the transportation of freight by "piggyback" (also known as trailer-on-flatcar, or TOFC, service). The essence of the service is the movement on railroad flatcars of laden truck trailers.

1. BACKGROUND AND GROWTH OF PIGGYBACK

Subject to qualification depending on the nature of the commodity and the origin and destination of the shipment, it is generally accepted that *large* quantities of freight can usually be moved most cheaply over *long* distances by rail. See, *e.g.*, S. Doc. No. 152, 73d Cong., 2d Sess., p. 17. However, rail transportation has obvious limitations. Many shippers and consignees are not located on railroad spur tracks, and—without piggyback—moving their freight by rail requires delivery to the railhead, transfer to railroad cars there, and, at destination, retransfer to trucks for delivery. Moreover, when less-than-carload shipments are involved, frequent delays are experienced while awaiting additional freight to fill up the railroad car. Because of these problems, motor carriers have been able to compete successfully for long-haul freight business. See *Coordination of Motor Transportation,* 182 I.C.C. 263, 336. The motor carrier is able to pick up freight at the shipper's establishment and carry it in a single movement direct to the con-

signee's door. Thus, depending on the size of the load, the distance traveled, and the existence of rail sidings at either or both ends of the haul, truck service is often as efficient, and frequently faster, than railroad freight service.[2]

The competitive balance between the railroad and the truck has been altered by the development and growing utilization of the piggyback technique (322 I.C.C. at 307–308, 322 (see n. 1, *supra*, p. 1)), which combines the

[2] The Commission has summarized the advantages of truck transportation as follows (*Coordination of Motor Transportation*, 182 I.C.C. 263, 301):

> The advantages of truck transportation from a service standpoint are to be found mainly in the speed, the completeness, and the flexibility of the service rendered. The area in which the truck has most effectively supplanted rail traffic is that which can be served one or more times during the day; the area within which overnight delivery can be made is a fertile field for the truck; to points more distant the service advantages of the truck are lessened until a zone of indifference or disadvantage is reached. Coupled with this phase of service is the ability or willingness of truck operators to take shipments at a later hour than the railroads ordinarily do and yet make earlier morning delivery.
>
> In the case of some shippers an even greater advantage of truck transportation is the completed service it renders. Only one transportation agency needs to be dealt with for given shipments and pick-up and delivery service is usually provided. There is also more flexibility about truck than rail service in moving emergency and irregular shipments. Special efforts are made to meet any unusual requirements of an industry or a shipper. Secondary factors favoring truck transportation are the more personal contacts between shipper and truck representatives than prevail between shipper and railroad, the less formal procedure, and, in some cases, the possibility of combining selling with transportation functions.

speed, flexibility and small-load advantages of door-to-door truck service with the line-haul efficiency of the railroad. Now, a trailer loaded by a shipper can be driven to the railroad yard, transferred directly to a flatcar for line-haul movement, and, at destination, driven off to the consignee (322 I.C.C. at 310–312). Delays from, and the high manpower cost of, transferring freight from trailer to boxcar and back to trailer again are eliminated. We do not suggest that piggyback is always a more efficient mode than all-truck or all-rail service. None, however, disputes that for many movements involving relatively long hauls this is so. As noted in a study of the Commission's Bureau of Economics:[3]

> The rapid growth of piggyback has been largely the result of its effectiveness in meeting the need for coordinating rail and motor services. Piggyback combines the advantages of movement by truck with the long-haul economies of rail or water transport, under conditions which hold total expense to a minimum. These factors have placed railroads and water carriers in a position to compete for traffic at locations not directly served by them and have made available to motor carriers the low-cost advantages of intermediate rail hauls or water movements over substantial distances, where agreements have been made with the rail or water carriers.
>
> Shippers have benefited from higher standards of service, reduction in the loss and

[3] *Piggyback Traffic Characteristics* (1966), pp. 16–17.

damage associated with successive handlings of freight, and often reduced rates. Manufacturing has experienced since World War II expansion in highly processed products, which in turn have generated a growing demand for specific types of transportation services. Products of high value per unit of weight, subject to frequent changes in design, and requiring minimum inventory levels generate a demand for premium-quality transportation. Piggyback becomes increasingly important as a growing segment of industry becomes more concerned with availability of premium-quality transport service, rather than with minimum cost. TOFC service can "free" industry from commitments to particular locations formerly necessary to obtain the benefits of low cost transport from one mode, e.g., an industry need not locate on a rail siding to make use of rail transportation of merchandise traffic.

In recent years piggyback service has expanded rapidly, and it is now a major factor in the transportation industry.[4] Its annual growth rate in the last decade has been approximately 15 percent, and no leveling off is yet in prospect (*Railway Age,* Aug. 1,

[4] In 1957, some 57 Class I railroads published piggyback tariffs; in mid-1963, 100 railroads did so (322 I.C.C. at 309). Annual railroad piggyback revenues now exceed $300 million (I.C.C. Bur. of Econ., *Transport Economics*, Nov. 1965, p. 1), and even greater expansion is indicated. In 1955 the 32 railroads that reported offering piggyback had 168,150 piggyback carloadings (322 I.C.C. at 309); in 1965, the 63 reporting railroads had 1,031,000 carloadings (Assn. of American Railroads, Car Service Div., Cir., CS–54A, January 1, 1966). Since a car is usually loaded with two trailers, this means that almost two million trailers moved by piggyback in 1965.

1966, p. 33). This dynamic growth has, however, created formidable regulatory problems. Central among them is the question of the right of motor carriers to participate fully in this new service.

2. MOTOR-CARRIER PARTICIPATION IN PIGGYBACK

In 1926, in response to motor-carrier competition, the Chicago North Shore & Milwaukee Railroad inaugurated door-to-door railroad piggyback service between Chicago and Milwaukee. In the 1930's, other railroads offered piggyback service on an experimental basis to motor carriers as well as to shippers. The experience of most railroads in piggyback was very limited, however, until 1954, when the Commission gave approval to a number of slowly developing practices. See *Movement of Highway Trailers by Rail,* 293 I.C.C. 93. Thereafter, piggyback began its intensive growth and development, but along separate paths for motor carriers and conventional shippers. (322 I.C.C. at 305–308.)

Some motor carriers entered into classic joint through route arrangements with various railroads. More frequently, however, they employed the railroad as an intermediate or "bridge" carrier for traffic originated and delivered by them under their own tariffs and bills of lading. In both cases, the railroads received as compensation an agreed-upon division of the revenue (*id.* at 306).

In addition to these joint intermodal arrangements, the railroads began to offer open-tariff service, but only to conventional shippers and freight forwarders

(*id.* at 306). Initially, door-to-door service, using railroad trucks for pickup and delivery, was stressed (*id.* at 311). More recently, emphasis has been given to ramp-to-ramp service. The shippers here must provide their own trailers, but in practice they often lease them from the railroad. Frequently the leases are for the loaded outbound portion of the trip only or the railroads lease back the trailer for the usually empty return trip (*id.* at 312–316). Railroads have also begun offering shippers various accessorial services—some not covered by tariffs—such as free or low-cost trailer loading and pickup and delivery (*id.* at 317). In these ways, the railroads independently offer shippers various door-to-door piggyback services.

In all, five basic piggyback arrangements have evolved (*id.* at 309–312):

Plan I: The shipper's property is transported by trailer, at the motor carrier tariff rate and on the motor carrier's bill of lading; but, by agreement with the railroad, the motor carrier substitutes piggyback rail movement for the line haul.

Plan II: Under its tariffs, the railroad offers its own trailers or containers to shippers for door-to-door service, using piggyback for the line haul.

Plan III: Under its tariffs, the railroad offers to haul trailers owned by others from railhead to railhead at a flat charge, without pickup or delivery.

Plan IV: Under its tariffs, the railroad hauls a trailer or container-loaded flatcar, furnishing only power and rails.

Plan V: The shipper's property is transported door-to-door by trailer under a joint rail-motor rate negotiated by the rail and motor carrier. The property moves on a rail or motor bill of lading, depending upon which carrier originates the shipment.

Plans I and V are joint intermodal plans. The former covers substituted service in which the railroad acts as a bridge carrier; the latter, the classic joint through route arrangement. Plans II, III and IV are open-tariff plans. Under Plan II the railroads offer a door-to-door service, frequently using their own trucks and trailers.[5] Under Plans III and IV they offer ramp-to-ramp service only, but in practice they often provide, through trailer leasing and the provision of local pickup and delivery, an all-rail door-to-door service. Freight forwarders, using these open-tariff plans, offer similar door-to-door piggyback service.

Thus, while motor carriers are traditionally the mode of transportation providing door-to-door service by highway trailer, "all three—rail carrier, motor carrier, and freight forwarder—* * * today provid[e], through the use of piggyback, services which in physical characteristics are substantially similar. Any one of the three can offer a transportation service which includes door-to-door pickup and delivery, movement of loaded trailers between a shipper's premises and a rail yard, and line-haul transportation of the loaded trailers by rail" (322 I.C.C. at 330).

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[5] Railroads may provide their own incidental truck service within "terminal areas." 49 U.S.C. 302(c)(1).

There is one significant difference, however. While railroads are themselves able to provide shippers, without the assistance of the motor carriers, a complete piggyback service, motor carriers desiring to provide such service must utilize the facilities of a railroad in every instance (*id.* at 327).

While the piggyback plans developed in the 1930's were designed by the railroads "to induce trucking companies to ship their vehicles by rail instead of operating them over the highways" (*id.* at 306), piggyback service did not follow in the 1950's the course of mutually beneficial rail-motor cooperation that these beginnings presaged (*id.* at 308–309, 323).

The root of the problem was the suggestion by the Commission in 1939 in *Substituted Freight Service,* 232 I.C.C. 683, that a motor carrier could not act as both a common carrier by motor vehicle and as a shipper by rail. This suggestion was taken by many as prohibiting motor carriers from using rail open-tariffs. Motor-carrier use of such tariffs continued to a limited extent (see, *e.g., Gordon's Transports, Inc.* v. *Strickland Transp. Co.,* 318 I.C.C. 395, 396–397, sustained *sub nom. Strickland Transportation Co.* v. *United States,* 219 F. Supp. 618, 620 (N.D. Tex.)), but for the most part rail-motor coordinated service shifted to voluntary Plan I and Plan V arrangements, which the railroads could, of course, refuse to enter into.

Furthermore, the railroads discovered in the late 1950's and early 1960's that all-rail piggyback service could capture from the motor carriers, if they were denied equivalent piggyback service, large volumes of traffic that long had moved over the highways (322

I.C.C. at 307–308). As a result, although the nation's largest and most strategically situated rail carriers increasingly offered open-tariff piggyback plans, many declined to offer any Plan I substituted service, under which most motor carrier piggyback traffic moves. Among these roads were the Atchison, Topeka & Santa Fe (with an exception for auto haulers) (R. 122); the Baltimore & Ohio (R. 231); the Chicago, Milwaukee, St. Paul & Pacific (R. 94); the Kansas City Southern (R. 74); the New York Central (R. 198); and the Southern Railway system (R. 61). Other railroads offered Plan I service only to their own subsidiary motor carriers (R. 65, 88, 105, 125). In some regions of the country, no service was made available by any of the railroads. Various motor carriers complained to the Commission that there was no transcontinental piggyback service (R. 63, 123),[6] and "no Plan I service of any type available between Midwest points east of the tier of states of Wyoming, Colorado, and New Mexico, on the one hand, and, on the other hand, points in the states west thereof. Transcontinental railroads operating between the latter points have elected not to offer any form of Plan I service to motor carriers between such points" (R. 123).[7]

Those railroads that did offer Plan I service generally asserted the right to pick and choose among

[6] Union Pacific now furnishes Plan I transcontinental piggyback service.

[7] Railroad reluctance to enter into cooperative arrangements with motor carriers is evidently a long-standing problem in the transportation industry. See Locklin, *Economics of Transportation* (6th ed.), p. 868.

the motor carriers. The factors considered included the interest in preventing motor-carrier piggyback rate competition with the railroads' own Plan II door-to-door service (R. 79–80).

Studies revealed that among Class I railroads, "plan II was being provided by the greatest number of railroads, followed closely by plan III. Plans I and IV ranked third or fourth, depending upon the survey used." Of 59 railroads asked to rank their plans as to fastest growth, "[p]lan III was placed in that category by 27 roads, plan II by 25 roads, plan I by 6 roads, plan V by 1 road, and plan IV by no roads."[8] I.C.C. 76th Ann Rep. (1962), pp. 87–88. Thus piggyback, while growing rapidly, was becoming predominantly a railroad service as opposed to a joint, coordinated service of the regulated motor carriers and the railroads.[9]

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[8] For example, the Pennsylvania Railroad, one of the largest Plan I carriers, instituted Plan II service in 1954 and Plan III in 1959. By 1962, although the Pennsylvania carried 80,000 motor carrier trailers in Plan I service, its burgeoning Plan II and Plan III service had far surpassed that figure with a total of 120,000 trailers (R. 222). Similarily, the Louisville and Nashville Railroad inaugurated Plan II in 1955 and Plans I and III in 1960. Its comparative results for January through August of 1962 were 1,590 trailers of motor carriers in Plan I service and a total of 15,330 shipper trailers in Plans II and III (R. 614).

[9] By 1965, a minimum of 42 percent of all piggyback shipments were found to be moving under plans in which the railroads directly or indirectly performed or provided the *entire* movement; motor carriers participated in only 28 percent. I.C.C. Bur. of Econ., *Transport Economics*, November 1965, p. 1. By contrast, in 1960 motor carriers had participated in 31.7 percent of piggyback movements, *Railway Age*, November 28, 1960, p. 25. Figures for 1965 further show that 934,590 highway trailers were transported wholly by railroads in that year; motor-carriers participated in the movement of only 199,174.

In February 1962, the American Trucking Associations, during oral argument to the Commission in the *Gordon's Transports* case (*supra*, p. 10), made a strong plea that motor carriers be allowed to utilize piggyback open-tariffs (Plans III and IV). The Associations contended that the railroads had demonstrated their intention not to enter into joint intermodal piggyback service with the motor carriers and had thereby "foreclosed" them from such service. *Transport Topics*, February 12, 1962, pp. 1, 13. The Associations pointed out (*ibid.*):

> The motor carriers frequently find themselves in the paradoxical position of being the only persons or carriers who or which are barred from using piggyback service. * * * This ironic turn of events does not conform to the purposes of the National Transportation Policy.

On April 5, 1962, President Kennedy sent a transportation message to Congress calling for legislative action to "assure all carriers the right to ship * * * on the carriers of other branches of the transportation industry at the same rates available to noncarrier shippers." H. Doc. No. 384, 87th Cong., 2d Sess., p. 5. Secretary of Commerce Hodges transmitted to Congress proposed legislation to implement the President's message. Hearings before the Senate Committee on Commerce, 87th Cong., 2d Sess., pt. 1, p. 13; see, also, Hearings before Surface Transp. Subcomm. of the Senate Committee on Commerce, 88th Cong., 1st Sess., pt. 1, p. 3.

The rail figure represents an increase of 16 percent over the previous year, while the motor carriers' total increased only 5 percent. I.C.C. Bur. of Econ., *Transport Economics*, March 1966, p. 3.

3. THE COMMISSION PROCEEDING

It was at this juncture that the Commission, on June 29, 1962, instituted, on its own motion, its "first general investigation of what is probably the most significant recent development in transportation—trailer-on-flatcar or piggyback service." Ex Parte No. 230, *Substitute Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301, 303. It advised Congress of its action and of its intention to "resolve" the matter, or if it could not, to recommend appropriate legislation. Hearings before Surface Transp. Subcomm. of the Senate Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., § 43, pt. 2, p. 801; Hearings on H.R. 4700 and H.R. 4701 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., pt. 1, p. 32. The Commission's statement was followed by requests from the industry that Congress withhold legislative action pending the Commission's decision in this proceeding. See, *e.g.*, Hearings on H.R. 4701, *supra*, pt. 1, p. 231, pt. 2, p. 991. No further action on the Administration's proposal was taken by Congress.

The Commission's notice of proposed rule-making announced that the proceeding would embrace every aspect of piggyback operations, including "[t]he extent to which motor carriers, water carriers, express companies and freight forwarders should be permitted to use Plans III and IV [open-tariff] rail rates and service in their operations" (R. 56). Representatives of every interested group, including

freight forwarders, railroads, motor carriers, water carriers, shipper interests, and various government agencies, participated in the proceedings. Two hearing examiners jointly prepared a recommended report and an order containing recommended rules (R. 607, 751). Their recommendations did not, however, require railroads to enter into joint-intermodal arrangements or to make open-tariff service available to other modes.

Exceptions to the examiner's recommendations were filed, and the Commission requested the parties to discuss (among other things) "[w]hether, and under what circumstances or requirements, TOFC service provided under an 'open tariff' can and should be made available to everyone (including freight forwarders, express companies, and common and contract motor and water carriers, exempt or regulated)" (R. 792). All agreed that voluntary coordination of intermodal service should be encouraged. The freight forwarders, however, argued that voluntary substituted rail service between points a motor carrier is certificated to serve, typical of Plan I, was not legal (R. 625). And both the railroads and the freight forwarders opposed any use by motor carriers of rail piggyback open-tariffs (322 I.C.C. at 329).

In its final report, the Commission observed that "*all* TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation" (*ibid.*, emphasis in original), and stated that it is "obvious to us that the inherent advantages of each mode of transportation can be given freest play through the

highest degree of coordination, and that encouragement of such coordination is in the public interest" (*id.* at 330). Coordinated service would confer benefits on both the rail and motor carriers and, "most important," on the "shippers and the general public which ultimately reap the benefits of the increased efficiency and economy" of such service (*id.* at 322). For these reasons the Commission concluded that motor carriers should be and legally were permitted to utilize piggyback open-tariffs "in lieu of their all-highway operations in the performance of authorized transportation between authorized service points" (*id.* at 336).

On the basis of these findings, the Commission promulgated two rules, numbered 2 and 3 (App., *infra*, pp. 74–75). Rule 2 (49 C.F.R. 500.2; 322 I.C.C. at 336) provides that "TOFC service, if offered by a rail carrier through its open-tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." The core of Rule 3 (49 C.F.R. 500.3; 322 I.C.C. at 337) is a provision that motor carriers "may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier."[10]

[10] The Commission promulgated other rules, relating to incidental aspects of piggyback service, which were also challenged below. The district court sustained them and they are not in issue in this appeal, although the rules governing equipment leasing have been challenged in *New York Central R. Co.* v. *United States*, No. 58, this Term, appeal pending.

In adopting these rules, the Commission emphasized that piggyback is still developing and that "whatever we do here will not be the final and definitive word on all the ramifications of piggyback service" (322 I.C.C. at 325). It called upon carriers and shippers to request remedial action if any rules should "prove in practice to have the unwanted effect of in any way hampering the flexible development and free use of TOFC service" (*ibid.*).

4. THE DECISION OF THE DISTRICT COURT

The railroads and freight forwarders that had participated in the proceedings before the Commission brought an action to set aside the Commission's rules. The three-judge court concluded that Rules 2 and 3 exceeded the Commission's authority and set them aside (R. 41), thereby upholding the absolute right of a rail carrier to refuse to carry, under its publicly available open tariffs, any trailers tendered to it by a motor carrier. The court held, first, that Sections 2 and 3(1) of the Interstate Commerce Act did not forbid a railroad thus to refuse to deal with motor carriers (R. 30). Further, it held that in any event a motor carrier's use of rail open tariffs would contravene both the express provisions of the Act and its entire "internal structure" and "legislative plan" (R. 30–31). The court relied specifically on Section 216(c) of the Act, 49 U.S.C. 316(c), which authorizes (but grants the Commission no power to compel) joint rates and through routes between motor carriers and rail carriers (R. 32), and certain provisions

of part IV of the Act regulating the business of freight forwarders (R. 35).

ARGUMENT

INTRODUCTION AND SUMMARY

It is generally (albeit not invariably) cheaper, faster and more efficient to move large quantities of freight long distances by rail than by truck; and yet a substantial amount of freight is, of course, transported by long-haul motor carriers. A truck can pick up the goods directly at the shipper's establishment and carry them in a single movement direct to the consignee. A railroad car cannot, unless both shipper and consignee have rail sidings. In the absence of such facilities rail transportation entails costly rehandling operations which tend to offset the railroads' long-haul advantages and enable the motor carriers to compete for this traffic. This has been changed, however, by the development and growing utilization of the piggyback technique, whereby the truck's trailer is moved—intact—onto a railroad flatcar at the originating railhead, and moved off again at the destination railhead to be hauled by truck to the consignee. The costly process of unloading the van at the originating railhead and there reloading its contents into a freight car—a process that must be repeated in reverse at the destination rail terminus—is eliminated. The result is a transportation method frequently cheaper and faster than either conventional rail transportation or long-haul truck transportation.

Although the essence of the advance which piggyback represents over previous techniques is that it fuses the inherent advantages of the rail and truck modes—the superior efficiency of the train in the long haul with the truck's ability to pick up and deliver at points not located on a railroad track—there are signs that the railroads seek to dominate the entire piggyback service, its motor as well as its rail portions. They will doubtless succeed in this aim unless prevented by law. They are not dependent upon motor carriers to perform the trucking services which piggyback entails. If the shipper has no truck, the railroad can lease one to him; if the shipper and consignee are proximate to the railheads, the railroad can pick up and deliver the goods using its own trucks; if the shipper or consignee is not located in the terminal area, the railroad can perform the necessary trucking services through a trucking subsidiary or a contract trucker. Moreover, the railroad has only to refuse to furnish flatcar transportation for trailers tendered by independent motor carriers to assure itself freedom from effective competition in providing piggyback services. It can exploit its dominant position in a slightly different fashion by permitting one or a favored few motor carriers to utilize its flatcars on terms dictated by it.

The prospect of railroad domination of all phases of piggyback service is not a theoretical one. Railroads have in fact widely, and increasingly, exploited the advantages of their position by the techniques outlined above (see Statement, *supra*, pp. 10–12). This

development (along with reports of illegal rebating and other forms of discrimination among shippers utilizing piggyback service) led the Interstate Commerce Commission to conduct the comprehensive inquiry that led to the promulgation of rules requiring the railroads to offer piggyback service to motor carriers upon the same terms as they offer it to conventional shippers and permitting motor carriers to utilize the service upon this basis. The legality of these rules is the issue here; two distinct though related questions are involved.

I

The first is whether the Commission correctly concluded that the Interstate Commerce Act forbids the railroads to discriminate with respect to the availability or terms of piggyback service upon the basis of the sender's identity, and so charge a higher rate, or flatly refuse service, to a motor carrier tendering its vans for shipment. We conclude that such discrimination is forbidden. As we show, the Act broadly forbids discrimination. The prohibition has long been interpreted as permitting a railroad to predicate a refusal to serve or a higher rate only upon the physical characteristics of the shipment—its distance and route and the nature of the commodity—and never upon the identity of the sender. Thus, rebates to favored shippers, discrimination against passengers on racial grounds, and, most pointedly, discrimination against other common carriers are forbidden.

There is no basis for carving an exception for a refusal to grant equal treatment to motor carriers desiring to utilize piggyback service for a portion of their movement. Piggyback, to be sure, is a relatively recent phenomenon; but Congress, in creating a permanent commission to enforce the broadly worded provisions of the Interstate Commerce Act, and in endowing that commission with broad enforcement powers, surely did not intend to restrict its reach to those forms of discrimination that existed in 1887. The Act has never been given such niggardly application. The proper inquiry, we believe, is whether discrimination in providing piggyback service to motor carriers produces the kind of evils at which the Act's antidiscrimination provisions are directed.

The law's special concern with discrimination by common carriers is rooted in the fact that often one or a few such carriers—whether for economic reasons or because they have received exclusive franchises from the government—enjoy a decisive competitive advantage (sometimes a monopoly) in transporting particular commodities or in servicing particular localities. The existence of such power makes its abuse a far graver matter than discrimination by an ordinary businessman. If the one railroad in town refuses to carry the freight of a particular shipper, he may be forced to choose a less efficient mode of transportation and may even be ruined. If the railroad picks and chooses among shippers, charging higher rates to some, granting inferior service to others, the competi-

tive balance among the shippers will be affected and the less efficient may prosper.

Because piggyback has given the railroads a significant competitive advantage in the door-to-door transportation over long distances of many commodities, discrimination by the railroads among motor carriers and between them and conventional shippers in furnishing piggyback service has consequences not unlike those of discrimination among ordinary shippers. The motor carrier denied access to the railroad flatcar on reasonable terms must perform the long-haul segment of the trip himself, even though this may be a rather inefficient alternative, or lose his customer. By refusing to deal with the regulated motor carriers, moreover, the railroads are in a position to dominate the motor as well as the rail segments of piggyback service, or to favor some motor carriers at the expense of others and thereby create unfairness and, perhaps, debilitate competition generally between the railroad and motor-carrier industries.

If any doubt remains that consequences of this nature bring the challenged discrimination within the antidiscrimination provisions of the Act, it is dispelled by the National Transportation Policy declared by Congress in 1940 as a guide to the Commission in interpreting and applying the Act. The concern of the Policy is with the relationship of the various modes of transportation regulated under the Act to each other—railroads, barges, trucks, freight forwarders. Its mandate—to achieve equity and coordination among the modes—cannot be fulfilled if the railroads are free to discriminate against motor com-

mon carriers who desire to participate in the benefits of a technique, like piggyback, which combines the intrinsic advantages of rail and truck carriage.

II

Nothing in the structure of the Interstate Commerce Act precludes a motor carrier from utilizing the shipper's tariff for a portion of the motor carrier's authorized service, as the Commission's rules in issue here permit. While a motor carrier is defined in the motor-carrier part of the Act as one who holds himself out as offering transportation by motor vehicle, he is nowhere forbidden to offer rail service in substitution for a portion of his authorized service, so long as he gives the shipper the option of all-truck movement—and this the Commission's rules require. The Commission has ample authority—and demonstrated willingness—to prevent motor carriers from abusing their rights of access to rail piggyback.

It is true that the Commission has no power under the Act to compel a railroad to enter into a through route with a motor carrier. However, in requiring the railroad merely to offer its open tariff piggyback service to motor carriers as well as ordinary shippers, the Commission's rules do not, as the court below thought, compel the formation of through routes. There is no compulsion to provide a through service. A railroad may, if its wishes, forego piggyback open tariffs altogether—in which event it will not be in violation of the Commission's rules. Moreover, the concept of a through route is a technical one. A holding out of a through service is required. There is

no holding out when the railroad merely publishes an open tariff and a motor carrier ships under it. Finally, the through-route provision evinces no purpose to withhold from the Commission the power to require the type of coordination involved here.

The Commission's rules do not, as contended by the freight forwarders, permit motor carriers to act as freight forwarders in violation of part IV of the Act. They do permit motor carriers to perform many of the same functions, but that has always been true and never before questioned. Since the rules permit motor carriers to perform such functions only as an incident to the performance of their authorized service, there is no invasion of the freight forwarders' domain. On the contrary, the rules restore a proper competitive balance between the two modes.

I

A RAILROAD'S REFUSAL TO PROVIDE A MOTOR COMMON CARRIER WITH FLATCAR SERVICE UPON THE SAME TERMS OFFERED ORDINARY SHIPPERS IS A DISCRIMINATION PROSCRIBED BY THE INTERSTATE COMMERCE ACT

A. UNDER SETTLED PRINCIPLES, A RAILROAD MAY LAWFULLY PREDICATE A REFUSAL TO ACCORD EQUAL TREATMENT ONLY UPON A RELEVANT DIFFERENCE IN THE PHYSICAL CHARACTERISTICS OF THE SHIPMENT—AND NOT UPON THE FACT THAT THE SENDER IS A COMPETING CARRIER

1. *Background*

At common law, it was early established that a common carrier was under a strict duty to carry all goods offered for transportation.[11] This duty was thought

[11] *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344, 382–383; *Montgomery Ward & Co.* v. *Northern Pac. Terminal Co.*, 128 F. Supp. 475, 490–493 (D. Ore.); Michie, *Carriers*, § 1601, p. 1175; Story, *Bailments* (8th ed.), § 508, p. 462; Angell, *Carriers* (5th ed.), p. 115; 2 Kent, *Commentaries* (14th ed.), § 590.

to be inherent in the nature of its undertaking and was absolute. An act of God or of the public enemy that made the rendering of service physically impossible was the only defense. *Montgomery Ward & Co.* v. *Northern Pac. Terminal Co.*, 128 F. Supp. 475, 521–522 (D. Ore.). A flat refusal to carry the goods of some shippers was thus unlawful, but other forms of discrimination—*e.g.*, in rates—were left untouched. While rates charged by common carriers were required at common law to be reasonable, no rule forbade the imposition of unequal, but not necessarily unreasonable, rates. See *Interstate Commerce Commission* v. *Baltimore & O. R.R.*, 145 U.S. 263, 275.

In England, Parliament legislated equality of rates in the "Equality Clause" of The Railways Clauses Consolidation Act of 1845, 8 & 9 Vict., c. 20, and proscribed all other undue preferences or prejudices between persons or localities in legislation enacted in 1854 and 1873. But in this country during the same period—when the railroads had a virtual monopoly of freight transportation and the only constraints upon discrimination were the inadequate strictures of the common law—secret rebates to favored shippers, negotiation of special rates with large shippers, and preferences and discriminations of all kinds flourished notoriously (see, *e.g.*, 1 Sharfman, *The Interstate Commerce Commission*, pp. 17–18)—indeed, played a major role in the growth of the great trusts (see, *e.g.*, *Standard Oil Co.* v. *United States*, 221 U.S. 1, 42). "[I]nequality of treatment as between persons, places, and commodities" by 1887 "constituted the outstanding evil of the railroad situation" (1 Sharfman,

supra, p. 17, n. 13), and was the principal spur to the passage of the Interstate Commerce Act in that year (*id.*, p. 18).[12] Not surprisingly, the "principal evil" at which the Act was aimed, as this Court has observed, was "discrimination in its various manifestations." *New York* v. *United States*, 331 U.S. 284, 296.

2. *The development of the rule of equality under the Interstate Commerce Act*

The Act mounted a comprehensive attack upon the problem of discrimination. Section 1(4) (49 U.S.C. 1(4)), which codified the basic common-law duty to serve (pp. 24–25, *supra*),[13] provides that every common carrier must "provide and furnish transportation upon reasonable request therefor." Section 2 (49 U.S.C. 2; App., *infra*, p. 70), modeled upon the Equality Clause of the English Railway Clauses Consolidation Act,[14] forbids "unjust discrimination," by prohibiting a rail carrier from demanding a greater compensation from one person for transportation than it demands from any other person for performing a similar service in similar circumstances. Section 3 (49 U.S.C. 3; App., *infra*, p. 71), modeled on the English acts of 1854 and 1873 (*Texas & Pac. Ry.* v. *Interstate Commerce Commission*, 162 U.S. 197, 222),

[12] See, also, S. Rep. No. 46, 49th Cong., 1st Sess., p. 215, quoted in 1 Sharfman, *supra*, p. 18, n. 14.

[13] *Lucking* v. *Detroit & Cleveland Nav. Co.*, 273 Fed. 577, affirmed, 284 Fed. 497, affirmed, 265 U.S. 346; 1 Sharfman, *The Interstate Commerce Commission*, p. 96, n. 32.

[14] *Texas & Pac. Ry.* v. *Interstate Commerce Commission*, 162 U.S. 197, 222; *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, 220 U.S. 235, 254.

forbids undue preferences or prejudices between persons or localities.[15]

With respect to discriminations based either upon the person of the sender or his interest in the goods being shipped ("personal" discrimination), these sections jointly create what the leading authority on the Interstate Commerce Act has termed the "rule of equality" (3 Sharfman, *supra,* pp. 359–413). That principle is the foundation of the Commission's rules challenged here. Section 2, which the Commission expressly cited in promulgating the rules (and of which, indeed, Rule 2 is a paraphrase), has been at the center of the development of the rule of equality.

The prohibition of discrimination in that section is absolute whenever a "like and contemporaneous service," a "like kind of traffic," and "substantially similar circumstances and conditions" are involved. Controversy, therefore, has focused on the quoted words. The carriers early advocated a reading of those terms that would justify different treatment based upon the type of shipper involved. But the same language in the English Equality Clause had been interpreted as referring solely to the physical characteristics of the service the railroad was asked to perform, not to circumstances arising before the service began or after it was terminated, such as the purposes of the sender or his in-

[15] Other sections, not directly relevant here, are also concerned with discrimination. Central among these is Section 6(7), which requires railroads to publish tariffs and adhere to them. See, also, Section 4(1), which forbids charging greater compensation for the same kind of traffic for a shorter than for a longer distance over the same line or route in the same direction.

terest in the goods,[16] and this interpretation was from the outset adopted by the Interstate Commerce Commission in construing Section 2. Attempts by railroads to accord special treatment to certain classes of traffic, not because the service rendered by the railroad was any different, but because discriminatory treatment would enhance the railroads' revenue or prevent loss of a customer to a competing carrier, were, therefore, uniformly condemned.[17]

The Commission's view was sustained by this Court. In *Wight* v. *United States*, 167 U.S. 512, 518, the Court held that the statutory phrase "under substantially similar circumstances and conditions" "refers to the matter of carriage, and does not include

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[16] *Great Western R. Co.* v. *Sutton*, L.R. 4 H.L. 226; *Denaby Main Colliery Co.* v. *Manchester Sheffield & Lincolnshire Ry. Co.*, 11 App. Cas. 97; *London & N.W. Ry. Co.* v. *Evershed*, 3 App. Cas. 1029.

[17] *Larrison* v. *Chicago & Grand Trunk R. Co.*, 1 I.C.C. 147 (mileage tickets offered only to commercial travelers); *Smith* v. *Northern Pac. R. Co.*, 1 I.C.C. 208 (lower fares for land explorers and settlers); *Cary* v. *Eureka Springs R. Co.*, 7 I.C.C. 286, 311 (special rate for shipment that was to proceed further by wagon); *In the Matter of Party Rate Tickets*, 12 I.C.C. 95 (party-rate tickets offered only to amusement companies and similar organizations); *Stowe-Fuller Co.* v. *Pennsylvania Co.*, 12 I.C.C. 215 (rate differences predicated on intended use of freight); *California Commercial Assn.* v. *Wells, Fargo & Co.*, 14 I.C.C. 422 (refusal to offer bulk-shipment rate for packages made up and tendered by freight agent); *Boise Commercial Club* v. *Adams Express Co.*, 17 I.C.C. 115, 121 (lower rates for prepaid shipments); cf. *Shoemaker* v. *C. & P. Telephone Co.*, 20 I.C.C. 614 (lower rates for old subscribers). See, also, *Crescent Coal & Mining Co.* v. *B. & O. R.R.*, 23 I.C.C. 81, 83; *In re Restricted Rates*, 20 I.C.C. 426; *In the Matter of Transportation of Company Material*, 22 I.C.C. 439; *Hitchman Coal & Coke Co.* v. *B. & O. R.R. Co.*, 16 I.C.C. 512, 517.

competition." If the service was the same, one sender could not be offered a lower rate to meet a competing carrier's rate.[18] Nor was it material that the sender was another carrier. In *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 225 U.S. 326, railroads offered special rates applicable to any coal shipped by another railroad for its own fuel use. These rates were lower than the rates published for carriage of coal for all other uses. This Court held the differential unlawful, ruling that a carrier who tenders freight for shipment may not be treated any differently from ordinary shippers, and that a railroad's duty of equality of charges extends to all patrons without distinction.[19]

The case most nearly in point here is *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, 220 U.S. 235, where this Court held unlawful the practice of some railroads of charging less-than-carload rates for carrying carload shipments tendered to them by freight forwarders (see pp. 63–67, *infra*)—these rates being higher than the carload rates charged other shippers for identical shipments.[20] The Court made clear that this discrimination was improper even though the freight forwarders were competitors of

[18] Accord: *Seaboard Airline Ry.* v. *United States*, 254 U.S. 57; *Interstate Commerce Commission* v. *Alabama Midland Ry.* 168 U.S. 144, 166; but cf. *Texas & Pac. Ry.* v. *Interstate Commerce Commission*, 162 U.S. 197.

[19] 225 U.S. at 342; *Louisville & N.R. Co.* v. *United States*, 282 U.S. 740; *Kansas City S. Ry.* v. *United States*, 282 U.S. 760.

[20] See, also, *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344; *Chicago Etc. R. Co.* v. *Acme Freight*, 336 U.S. 465.

the railroads who, if permitted to utilize carload rates, might siphon off a portion of the railroads' revenues from less-than-carload traffic. In the Court's view, the railroads were not entitled to inquire into the purposes or interest of the sender and upon finding he was a carrier rather than the owner decline to accord him the same treatment as ordinary shippers. "The contention that a carrier when goods are tendered to him for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement." 220 U.S. at 252.

3. *Application of the rule of equality to discriminatory refusals to provide service*

The principle of equal treatment enunciated in rate-discrimination cases like *Interstate Commerce Commission* v. *Delaware, L. & W. R.R., supra,* applies with undiminished force to the greater discrimination involved in a flat refusal to provide service to a particular sender on grounds unrelated to the nature of the service desired. Although Section 2 in terms applies only to differences in the charge exacted for a service, the practical economic effects of a refusal to serve and of a discriminatorily high rate are often the

same and this Court equated the two forms of discrimination in the passage quoted above from the *Delaware, L. & W. R.R.* case. But we need not stop there. Section 1(4) of the Act, as noted above, incorporates the common law rule that a carrier is bound to receive and carry all goods offered for transportation, without exception, unless physically incapable of doing so.[21] It is an *a fortiori* violation of this section to deny one class of shippers the same service being rendered another class. In addition, the principle that a carrier may discriminate only upon the basis of the physical circumstances of the carriage—the nature of the commodity, the distance, etc.—rather than the person of the shipper or his interest in the goods has been applied to cases arising under Section 3(1). *Louisville & N. R. Co.* v. *United States,* 282 U.S. 740; *Kansas City S. Ry.* v. *United States,* 282 U.S. 760. These cases make clear that when a carrier tenders goods as a shipper, it is entitled to the same treatment as any other shipper.

[21] See *Minneapolis & St. Louis Ry. Co.* v. *Pacific Gamble Robinson Co.*, 215 F. 2d 126, 133, 135 (C.A. 8); *New York Central R.R. Co.* v. *Interstate Commerce Commission*, 201 F. Supp. 958 (S.D.N.Y.), vacated as moot, 371 U.S. 805; *Galveston Truck Line Corp.* v. *Ada Motor Lines*, 73 M.C.C. 617. In *New York Central*, the railroad had adopted an embargo upon certain less-than-carload shipments, claiming that such traffic was unprofitable. The court held that Section 1(4) prohibited the railroad from refusing to deal for economic reasons, and pointed out that in almost all cases in which the laying of an embargo had been approved (*e.g.*, *Holt Motor Co.* v. *Nicholson Universal S.S. Co.*, 56 F. Supp. 585 (D. Minn.)), weather conditions, traffic congestion, or other physical or operational conditions had made it impossible for the carrier to provide transportation.

In short, Sections 1(4), 2 and 3(1) have been read *in pari materia* as creating a rule of equality under which all personal discriminations against shippers and passengers using the same transportation service are prohibited. It is irrelevant in such cases that the discrimination is required to meet competition (*Wight* v. *United States,* 167 U.S. 512, 518) or to prevent losses (*New York Central R.R. Co.* v. *Interstate Commerce Commission, supra* n. 21), or that it has no competitive effect (*National Spring & Wire Co.* v. *Director General,* 60 I.C.C. 564, 566), or would attract new business (*Smith* v. *Northern Pacific R. Co.,* 1 I.C.C. 208).

B. THE RAILROADS' REFUSAL TO PROVIDE FLATCAR SERVICE FOR TRAILERS TENDERED BY MOTOR CARRIERS ON THE SAME TERMS AS THEY PROVIDE SUCH SERVICE TO CONVENTIONAL SHIPPERS VIOLATES THE RULE OF EQUALITY. THE RAILROADS' DUTY IN THIS REGARD IS NOT, AS THE COURT BELOW THOUGHT, QUALIFIED BY THE PROVISO TO SECTION 3(1)

The Commission's open-tariff piggyback rules are virtually a restatement of the rule of equality. They require railroads offering open-tariff piggyback service to accept for shipment all trailers tendered by motor carriers, and forbid them to charge discriminatory rates for such shipments. This is merely a command to the railroads to serve all shippers without discrimination—the fundamental duty of the common carrier. Upon what possible basis can the railroads justify discrimination against the motor carriers? There is certainly no physical difference in the circumstances involved or the service to be performed, and the fact that the motor carriers do not

own the freight and are competitors in transportation is irrelevant.[22] *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, 220 U.S. 235. Yet, the railroads have asserted only these unacceptable grounds.

The present case is indeed no different in essentials from *Delaware, L. & W. R.R.* If a railroad must treat a freight forwarder tendering goods for shipment no differently from an ordinary shipper—the teaching of that case—so must it offer a motor carrier the same trailer-on-flatcar service it offers conventional shippers (including freight forwarders). To be sure, the antidiscrimination provisions of the Act are intended to protect shippers, not competing carriers as such (*e.g.*, *Atlantic Coast Line R. Co.* v. *Southern Ry. Co.*, 302 I.C.C. 711, 716), but the decisions of this Court make clear that this precept is inapplicable where the competing carrier is tendering goods for shipment and the relationship between the railroad and that carrier is consequently one of carrier and patron.

We have thus far been speaking generally of the rule of equality. And ordinarily it is unnecessary to decide which of the antidiscrimination sections of the Act forbids a specific form of discrimination, since these sections together preclude all such discriminations.[23] The court below, however, reasoned that a

[22] Also pertinent here is the rule that a railroad must transport goods in the cars of another railroad without compelling a breaking of bulk and the transfer of the goods to its own cars. Elliott, *Railroads* (2d ed.), § 1395. See, also, 49 U.S.C. 7.

[23] Cf. *Pennsylvania R.R.* v. *Puritan Coal Co.*, 237 U.S. 121, 132:

> It makes little difference what name is given the cause of action sued on in the present case; or whether it is treated

flat refusal to provide service is cognizable only under Section 3(1) of the Act, and that, since Section 3(1) is limited by a proviso that it "shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description," the railroads cannot be prevented from discriminating against trailers tendered by motor carriers. This reasoning bespeaks a failure to recognize that Section 3(1) has more than a single function in the scheme of the Act—and that its proviso is wholly inapplicable in the present context.

With respect to "personal" discrimination—refusal to accord equal service because of the identity or interest of the sender—and specifically with respect to discrimination based solely on the goods' having been tendered by a carrier, this Court has reached the same result—that it is wholly unjustifiable—whether Section 2 or Section 3 was invoked. A refusal to perform the same service for a carrier *qua* shipper as for other shippers is both unjust discrimination and unreasonable prejudice. *Interstate Commerce Commission* v. *Baltimore & Ohio R.R.*, 225 U.S. 326; see

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as a suit for a breach of the carrier's common law duty to furnish cars, or an action for damages for the carrier's unjust discrimination in allotting cars to the [one company] * * * while at the same time refusing to follow its own rule and furnish them to the [other company] * * * on the basis of mine capacity. In either case the liability is the same. For where the carrier performs its duty to A and at the same time fails to perform its duty to B, there has been, in a sense, a discrimination against B. In those instances neither the cause of action, nor the jurisdiction of the court, is defeated because the breach of duty is also called an unjust discrimination,

Interstate Commerce Commission v. *Delaware, L. & W. R.R.*, 220 U.S. 235, 252 (pp. 29, 30, *supra*); *Louisville & N. R. Co.* v. *United States*, 282 U.S. 740; *Kansas City S. Ry.* v. *United States*, 282 U.S. 760. Thus, where two senders (one a conventional shipper, the other a motor carrier) tender the same cargo (a truck trailer) for the same flatcar service over the same route for the same distance, the rule of equality requires the railroad to treat both patrons the same. In this respect, Section 3(1) and Sections 2 and 1(4) overlap.

Section 3(1), however, reaches many forms of discrimination not covered by the rule of equality or cognizable under Sections 1(4) or 2. Principally, these are situations in which the alleged service discrimination involves neither a flat refusal to serve nor different treatment of shipments physically the same. Thus, when two shippers send freight to different points on the same or different lines of the same railroad, or are located at different points on the same or different lines of the railroad, a difference in rate or service (not involving a refusal to carry) may ordinarily be attacked only under Section 3(1), as an undue or unreasonable preference or prejudice to a person, company, locality, or region. In such a case the prohibition of Section 3(1) is not absolute, as it would be in any case involving personal discrimination. The inquiry is broader. The two shippers must be in competition with each other (*United States* v. *Great Northern Ry.*, 301 I.C.C. 21, 26–27)—a requirement not present in personal discrimination cases (*National Spring & Wire Co.* v. *Director General*, 60 I.C.C. 564,

566)—and the court may consider competitive necessity as a justification for a rate preference (*Texas & Pacific Ry. Co.* v. *United States,* 289 U.S. 627; compare *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U.S. 144)—a factor that also would not be relevant in a simple personal discrimination case (*Wight* v. *United States,* 167 U.S. 512, 518).

Such considerations have never been deemed relevant in a case of personal discrimination challenged under Section 3(1). For example, this Court expressly ruled out competition as an admissible factor in its *Baltimore & Ohio R.R.* decision (p. 29, *supra*), which involved that section. 225 U.S. at 343. Personal discriminations are flatly prohibited by the rule of equality whether Sections 1(4), 2 or 3(1) are invoked. The proviso in Section 3(1) was never intended to excuse such discriminations. Its only application is with respect to the broader function of the section in regulating a range of different discriminatory practices which normally cannot be challenged under the other provisions of the Act.

Specifically, while Sections 2 and 1(4) confer rights against discrimination only on the patrons of a railroad, Section 3(1) also confers such rights upon individuals, corporations or localities, not patrons, that may be injured by the discriminatory practice of a railroad (*Barringer & Co.* v. *United States,* 319 U.S. 1, 13); and so elastic is Section 3(1) that a carrier which suffered a diversion of traffic to a competing carrier by reason of the latter's lower rates or superior service could conceivably invoke Section 3(1). The proviso to the section was intended to close that avenue of attack. It was not intended to go further

and permit a railroad to discriminate as between shippers because one shipper was also a carrier. This is apparent from the language of the proviso itself. It exempts only discrimination against the "traffic" of another carrier. This term signifies the custom of the carrier—the business it enjoys when a shipper entrusts his goods to it for transportation, not a carrier's tender of trailers—its own or others', laden or empty—for rail transportation like a conventional shipper. See *Interstate Commerce Commission* v. *Baltimore & Ohio R.R. Co.* and *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, discussed p. 29, *supra*. The legislative history strongly supports this construction.

Added to the Act by the Transportation Act of 1940, the proviso was taken verbatim and without any discussion from Section 216(d) of the Motor Carriers Act of 1935 (now 49 U.S.C. 316(d)). Section 216(d) is a provision, modeled on Sections 2 and 3(1) of the Interstate Commerce Act, which forbids unjust discriminations and undue preferences and prejudices by motor carriers. See H. Rep. No. 2016 (Conference Report), 76th Cong., 3d Sess., p. 62. The sole purpose of the proviso, as it appeared originally in the Motor Carriers Act (an Act passed against a background of intense motor-rail competition), was to make clear that a railroad had no standing to complain that it was unreasonably prejudiced or disadvantaged because a competing motor carrier was charging a lower rate. 79 Cong. Rec. 5656 (remarks of Senator Wheeler, the bill's sponsor). The very broad language of Section 216(d) (as of Section

3(1)) might, as mentioned, have supported such a claim (see Hearings before Subcomm. of H. Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess., p. 64)—the concept of undue preference or prejudice being broad enough to permit a person not a patron to complain about a carrier's conduct. To dispel any doubt Congress decided to provide explicitly that the fact that a motor carrier's rate was lower than a railroad's was not a basis for proceeding under Section 216(d).

The incorporation of the proviso in Section 3(1) a few years later was doubtless intended to deal with the converse situation of a railroad's rate which undercuts a motor carrier's rate. There is no indication it was meant to permit a railroad to discriminate against a patron because he happened to be, not the owner of the goods tendered for shipment, but a carrier of them. That would have amounted to overruling this Court's well settled rulings in personal-discrimination cases under Section 3(1), and there is not the slightest evidence that Congress had any such purpose. Had Congress so purposed, moreover, it would certainly have amended Sections 1(4) and 2 as well as Section 3(1), to avoid the anomaly of permitting a carrier to discriminate in service against another carrier while prohibiting him from discriminating in rates. Experience shows that service discriminations are frequently but evasions of the statutory proscription of rate inequality. See *Barringer & Co.* v. *United States,* 319 U.S. 1; *United States* v. *Baltimore & O. R.R.,* 333 U.S. 169.

C. APPLICATION OF THE RULE OF EQUALITY HERE IS REQUIRED BY THE POLICIES WHICH UNDERLIE THE ACT'S PROHIBITION OF DISCRIMINATION

We have shown that the precedents in this Court establishing the rule of equality are fully applicable to the present case. But we do not rest there. The novelty and importance of the question invite fresh examination. We shall argue here that the basic policies which underlie Section 2 of the Interstate Commerce Act—and related provisions like 1(4) and 3(1)—compel, as an original matter, the conclusion that discrimination against motor carriers in the provision of flatcar service is unlawful.

We preface our discussion of policy with the observation—really a truism—that Congress, in legislating a comprehensive prohibition of discrimination, was not concerned merely to forbid the particular forms of discrimination extant in 1887. Had that been the legislative purpose, Congress would not have established an elaborate scheme of administrative regulation and enforcement. It did so, as this Court has remarked, so that particular "conditions which may directly frustrate the success of the regulation undertaken by Congress" could be remedied without additional legislation even though they might not have been anticipated by the original draftsmen. *American Trucking Assns.* v. *United States,* 344 U.S. 298, 311; *id.* at 311–313; *United States* v. *Pennsylvania R. Co.,* 323 U.S. 612, 616 (pp. 47–48, *infra*). See, also, *Assigned Car Cases,* 274 U.S. 564. The cited cases hold that the Commission is not confined to the precise statutory language—that it may—and must—

interpret the Interstate Commerce Act flexibly, in accordance with its overriding purpose to eliminate all types of harmful discrimination.[24] We are justified in invoking that principle here because the discrimination that the Commission questioned in this case has many of the same injurious consequences as the traditional forms encompassed by the prohibitions of the Act.

An example will illustrate. Suppose that in a certain town there are two bakers, *A* and *B*, and one railroad. Both bakers, of course, need sugar for their business. The nearest commercial source of sugar, however, is several hundred miles away. *A* and *B* use the railroad to ship in the sugar they need, because that is the cheapest and most efficient mode of transportation available. If *A* persuades the railroad to refuse to carry sugar for *B*, or to charge *B* a much higher rate for the service, *B* may be ruined—leaving *A* with a monopoly of the town's baking industry—or (what is essentially the same) so disadvantaged as to be incapable of offering *A* effective competition. At the least, *B* will be compelled to utilize what is by hypothesis a less efficient and more expensive method of transporting sugar in the circumstances. By so doing, he may be able to remain a viable competitor; but the public interest in sound allocation of the nation's economic resources is im-

[24] *New York* v. *United States*, 331 U.S. 284, 296 (p. 26, *supra*); *Boynton* v. *Virginia*, 364 U.S. 454; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56; *United States* v. *Baltimore & O. R.R.*, 333 U.S. 169; *Chesapeake & O. Ry. Co.* v. *United States*, 11 F. Supp. 588 (S.D. W. Va), affirmed, 296 US. 187.

paired whenever goods that can more efficiently be transported by rail are diverted to other modes. These are the traditional evils fostered by discrimination on the part of carriers having a decisive advantage, in terms of competition and efficiency, with respect to a particular kind of traffic. The illegality of such discrimination is beyond dispute. Yet, the discriminatory practices employed by the railroads with respect to piggyback service lead to the same kind of harmful result.

Imagine a town with two motor common carriers, *X* and *Y*, and, again, one railroad. The town has a number of manufacturers who market their products in distant localities, but who are too small to have their own railroad sidings or fleets of trucks and therefore depend upon *X* and *Y* to pick up the goods at their factories and deliver them to the railroad's terminal. For such shippers, piggyback may well be—and let us assume that in the circumstances it is—the cheapest and most efficient method of shipment. But suppose the railroad, having purchased a fleet of trucks to perform the pickup service formerly rendered by the motor carriers, refuses to accept for transportation on its flatcars trailers tendered by *X* or *Y*. Those shippers who prefer piggyback will give their patronage exclusively to the railroad. Other shippers may remain loyal to the motor carriers, but, to the extent that they do, economic waste will result. For the motor carriers must now perform the long-haul segment of every movement themselves; consequently, a shipment that, in the interest of the maximum efficient utilization of the nation's

transportation resources, should move by rail will, instead, crowd the highways.

These illustrations are perhaps sufficient to demonstrate that the consequences of railroad discrimination in the terms or availability of piggyback service are essentially like the classic injurious consequences of railroad discrimination among shippers. But the serious implications of the present railroad control of piggyback will bear further elaboration.

We start with a premise that none disputes: piggyback is often a more economical method of transporting commodities for long distances than either all-truck carriage or conventional rail-plus-truck carriage (where the shipment must twice undergo costly rehandling operations before it reaches its ultimate destination). Were it otherwise, how to explain the phenomenal growth of piggyback? It is because of this superior efficiency that the railroads' present policy of either refusing motor carriers any access to piggyback or making it selectively available to them on terms dictated by the railroad constitutes so insidious a form of discrimination.

To the extent that motor carriers are prevented from utilizing flatcar service in their long-haul movements, a misallocation of national transportation resources will in many instances result. A long-haul motor carrier excluded from participation in piggyback must choose between abandoning long-haul shipping altogether on routes where piggyback service is offered or using his trucks for the line-haul as well as

terminal portions of such shipments. In some cases the first choice will be compelled; the motor carrier will simply find that he is unable to compete with the railroad. Sometimes, however, either by paring his profits to the bone or by virtue of a special relationship with the shipper, the motor carrier will be able to retain the traffic. In those instances trucks will be used to move shipments over distances for which railroad piggyback service may be more economical and efficient, and the highways and the trucking industry burdened with traffic which, under a rational allocation of transportation resources, belongs on the rails.

Railroad domination of piggyback may also foster monopoly conditions in the vital truck segment of piggyback service. The railroads may now refuse, at their option, to offer any piggyback service to motor carriers.[25] They are also free to charge them rates that exceed open tariffs. The railroads have frequently exercised these options, and candidly admit that a consideration in doing so is the desire to elimi-

[25] In addition, a suit attacking the validity of Plan I service, which accounts for 70 percent of motor-carrier participation in piggyback (I.C.C. Bur. of Econ., *Piggyback Traffic Characteristics* (1966), p. 58), is now pending. *Lone Star Packing Car Company* v. *United States*, Civ. No. 4-355 (N.D. Tex.). If successful, it would almost totally exclude motor carriers from piggyback. There has also been serious doubt as to whether contract carriers, which account for approximately 9 percent of motor-carrier business, could use Plans I or V. See 322 I.C.C. at 350. The open-tariff rules eliminate this doubt also since they make piggyback service freely available to those carriers.

nate motor-carrier rate competition (Statement, *supra*, pp. 10–11).

There is surely no reason for thinking the railroads are any better equipped to provide truck service than certificated motor carriers—whose business, after all, is providing transportation by truck. Consequently, the elimination of motor-carrier competition from the truck segment of piggyback would appear to reflect, not efficiency, but only the railroads' economic power. This is a classic instance of unfair competition. As in tying arrangements traditionally condemned under the antitrust laws,[26] the leverage flowing from the railroad's complete control of the essential rail segment of piggyback service could enable it to transfer its monopoly power to the truck segment and thereby perhaps eliminate competition in the latter service from the independent motor carriers.[27] That is at odds with the well settled rule that a company lawfully possessing monopoly power in one market may not, by refusals to deal, seek domination of another market. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359; *United States* v. *Klearflax Linen Looms*, 63 F. Supp. 32 (D. Minn.).[28]

[26] See *e.g.*, *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1; *International Salt Co.* v. *United States*, 332 U.S. 392.

[27] The danger that the railroads will monopolize the truck segment of piggyback service is not a theoretical one. A minimum of 42 percent of all piggyback shipments now move under plans in which the railroads perform (or provide indirectly) the *entire* service; independent motor carriers participate in only about 28 percent of the shipments and then only on the railroads' terms (see Statement, *supra*, p. 12, n. 9).

[28] The consequences are not markedly less injurious where the railroad permits motor-carrier participation in piggyback

In addition, the absence of any legal restraints upon the railroads' dealings with motor carriers desiring to use piggyback invites harmful discrimination *among* motor carriers. Those motor carriers whom the railroads favor by permitting them access to piggyback service or by granting them more favorable terms than other motor carriers receive a substantial competitive advantage over the others—an advantage unrelated to superior efficiency. Such preferences are bound to debilitate competition in the motor carrier industry. They are the very evils at which the anti-discrimination provisions of the Act were aimed. And the promotion of alliances between railroads and a few favored carriers would be bound in the long run to weaken competition between railroads and motor carriers generally.

The short of it is that while piggyback is a novel method of transporting freight, the consequences of permitting the railroads to discriminate against motor carriers in the provision of this service are the same as those produced by the familiar forms of discrimination outlawed by the Interstate Commerce Act. Accordingly, the application of the rule of equality in the piggyback context accords with the historic purposes of the Act—foremost among which was a determination to prevent the railroads from abusing the great power that they frequently enjoy with respect to particular kinds of transportation service.

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service but at rates so much higher than those charged ordinary shippers as to assure that the competition of the motor carriers will be marginal and that the railroads will skim off the bulk of the profits to be made in the truck segment of the service.

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As next we show, any doubt there may once have been on this score was laid to rest by Congress' declaration of a "National Transportation Policy" to guide the Commission in interpreting the Act.

D. THE NATIONAL TRANSPORTATION POLICY DIRECTS THE COMMISSION TO INTERPRET AND APPLY THE INTERSTATE COMMERCE ACT SO AS TO PROMOTE EQUITY AND COORDINATION AMONG THE MODES OF TRANSPORTATION SUBJECT TO ITS REGULATORY JURISDICTION; THIS MANDATE REQUIRED THE COMMISSION'S CONSTRUCTION OF THE DISCRIMINATION PROVISIONS OF THE ACT.

In 1940, Congress enacted as a preamble to each of the four parts of the Interstate Commerce Act what it declared to be "the national transportation policy." The basic tenets of the policy are (49 U.S.C. preceding § 1):

> * * * to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, * * * so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices * * *—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. * * *

The Commission is enjoined that "[a]ll of the provisions of * * * [the Interstate Commerce Act] shall be administered and enforced with a view to carrying out" the declared policy. This Court has made clear that the National Transportation Policy is "the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83, 88; see, *e.g.*, *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82–83.

The importance of the Policy as a guide to, and basis of, decision is illustrated by *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612—a case similar in significant respects to the present one. The issue was whether the Commission could, in the absence of specific statutory authority, require railroads to interchange their cars with water carriers.[29] Seatrain Lines had constructed ships specially equipped to carry entire railroad cars, thus enabling an integrated rail-water service—analogous to piggyback—that would not require the goods to be unloaded from the railroad car and then reloaded onto the ship. Utilization of this economical method was frustrated by the railroads' refusal to deliver cars to Seatrain's ships. This Court sustained the Commission's assertion of authority to compel interchange. Holding that "the absence of specific language" was not determinative and that "[t]he very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms" and leave "the contents of these terms

[29] It did have express authority to compel rail and water carriers to form joint through routes with one another. 49 U.S.C. 1(4), 905.

to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose [which the Court found expressed in the National Transportation Policy] to foster an efficient and fair national transportation system," it emphasized that to permit the railroads to pick and choose among water carriers and thereby weaken competition among them would be inconsistent with the Policy's dictate of "fair and impartial regulation of all modes of transportation subject to" the Interstate Commerce Act. 323 U.S. at 616–617; see, also, *id.* at 619.

The present is an *a fortiori* case for upholding the Commission. Here, the affirmative statutory basis of the Commission's rules is, as we have seen, far clearer; as we shall presently urge, the objectives of the National Transportation Policy even more urgently require the accommodation made. We point out, too, that the bearing of the Policy was a principal issue in the Commission proceeding, and that the Commission's conclusion—that "the inherent advantages of each mode of transportation can be given freest play through the highest degree of coordination and that such coordination is in the public interest" (322 I.C.C. at 330)—is entitled to great weight in view of the Commission's experience and knowledge in transportation matters (*e.g.*, *Barringer & Co.* v. *United States*, 319 U.S. 1; *New York, New Haven & Hartford R.R. Co.* v. *Interstate Commerce Commission*, 200 U.S. 361).

1. The initial directive of the Policy is that the Commission is to provide "fair and impartial regulation of all modes of transportation" subject to its jurisdiction. This Court in *United States* v. *Pennsylvania R. Co., supra,* declared that the Commission would breach this duty if it permitted railroads to discriminate among carriers of a different mode with respect to participation in an advantageous joint service. As noted earlier, such discrimination is practiced by the railroads in making piggyback service available to some motor carriers but not to others.

2. The Commission is directed "to recognize * * * the inherent advantages of each" mode of transportation. This implies both that traffic should not be diverted arbitrarily from the mode most capable of handling it efficiently and that each mode should have a fair opportunity to compete for the traffic that it can best handle. If the Commission countenanced railroad domination of the motor as well as the rail phases of piggyback, both precepts would be seriously impaired.

Piggyback is a bimodal service—not a pure rail service. Its superior efficiency lies in the fact that it combines the inherent advantages of rail and truck service; its performance requires trucks as well as trains. Uniting the inherent advantages of both modes, it should be available to either. If railroads may offer a

complete door-to-door piggyback service, using trucks, motor carriers ought to be free to offer the same service using the rails. Thus, the Commission properly rejected the railroads' argument that the open-tariff rules permit the motor carriers to exploit the railroads' long-haul efficiency instead of preserving the inherent advantages of the rail mode (322 I.C.C. at 329, 330). The Commission's rules only permit the motor carriers to compete with railroad and shipper trucks in the truck segment of piggyback. There is no inroad upon the railroads' right to charge fully compensatory rates for carrying truck trailers on their flatcars regardless of whose trucks haul the trailers to and from the railhead.

3. Unrestricted railroad domination of piggyback is manifestly incompatible with the "adequate, economical, and efficient service" that is one of the desiderata declared in the National Transportation Policy. It is frequently inefficient to force long-haul traffic to move by truck—a likely consequence, as we have seen, of the railroads' present policies. So, also, "sound economic conditions in transportation and among the several carriers" are not fostered if the railroads are permitted to discriminate among motor carriers in making piggyback service available.

4. The railroads' exclusionary policies with respect to piggyback service are also incompatible with "encourag[ing] the establishment and maintenance of reasonable charges for transportation services"—their

tendency being, rather, to promote monopoly conditions that may lead to increased rates. Cf. *Georgia* v. *Pennsylvania R. Co,* 324 U.S. 439. For the reasons explored in the preceding subpart, it is likewise clear that the railroads' policies promote "unjust discriminations," "unjust preferences or advantages" and "unfair or destructive competitive practices" and conflict with the ultimate desideratum declared in the Policy—"developing, coordinating, and preserving a national transportation system by * * * highway * * * and rail, * * * adequate to meet the needs of the commerce of the United States * * *."[30]

[30] *United States* v. *Rock Island Co.*, 340 U.S. 419, where this Court upheld, under the motor-carrier provisions of the Act the practice of the Commission in limiting railroads' motor-carrier affiliates to operations auxiliary and supplemental to rail service, is relevant here. The Court reasoned (340 U.S. at 432–433):

> * * * Such limitation was in furtherance of the National Transportation Policy, for otherwise the resources of railroads might soon make over-the-road truck competition impossible, as unregulated truck transport, it was feared, might have crippled some railroads. Motor transportation then would be an adjunct to rail transportation, and hoped-for advancements in land transportation from supervised competition between motors and rails would not materialize. The control of the bulk of rail and motor transportation would be concentrated in one type of operation. Complete rail domination was not envisaged as a way to preserve the inherent advantages of each form of transportation.

See, also, *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60; *Eastern Express, Inc.* v. *United States*, 198 F. Supp. 256 (S.D. Ind.), affirmed, 369 U.S. 37.

The burden of our argument thus far has been to show that the Commission was correct in finding that the railroads are forbidden under the Interstate Commerce Act to refuse motor common carriers the same piggyback service, and upon the same terms, that they offer it to ordinary shippers. We believe that this conclusion is compelled by the Act's prohibition of discrimination, as construed by this Court, notably in *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, 220 U.S. 235. Further, the Commission has broad authority to proscribe practices conducive to the evils at which the Act is directed, even if those practices are not specifically forbidden. And, finally, the Commission's construction is strongly supported by the principal interpretive aid available—the National Transportation Policy, enacted expressly to guide the Commission in administering the Act.

Such is our affirmative argument. It remains to discuss appellees' contention that application of the discrimination provisions of the Act in the manner we urge is inconsistent with the statutory limitations upon the services that motor carriers may perform.

II

THE INTERSTATE COMMERCE ACT DOES NOT MANIFEST ANY PURPOSE TO PRECLUDE A MOTOR CARRIER FROM USING PIGGYBACK CARRIAGE AS A SUBSTITUTE FOR OVER-THE-HIGHWAY TRANSPORTATION FOR A PORTION OF ITS AUTHORIZED SERVICE UPON THE SAME TERMS AS AN ORDINARY SHIPPER

We consider under this heading three points: whether it is "repugnant" to the general scheme of the

Act for a motor carrier to act as a shipper with respect to a portion of his authorized service, as permitted by the Commission's rules; whether those rules compel the establishment of joint motor-rail through routes in violation of the Act; and whether the rules, contrary to the Act, permit motor carriers to act as freight forwarders.

A. A MOTOR CARRIER DOES NOT VIOLATE ITS CERTIFICATE MERELY BECAUSE IT UTILIZES RAIL SERVICE UNDER OPEN TARIFFS FOR PORTIONS OF SOME SHIPMENTS; THE COMMISSION WAS ENTITLED TO REJECT ITS EARLIER DICTUM TO THE CONTRARY

1. The Interstate Commerce Act defines a "common carrier by motor vehicle" regulated under the Act as "any person which holds itself out to the general public to engage * * * in transportation by motor vehicle" (49 U.S.C. 303(a)(14)). The Act nowhere states, however, that a motor carrier who also offers to perform (unless otherwise directed by the shipper) a portion of his authorized service by rail piggyback rather than over the highway exceeds his authority. Nor does the legislative background support such an inference.

Prior to the enactment of the Motor Carriers Act of 1935, which first subjected motor carriers to federal regulation, it was settled that a competing unregulated mode of transportation was eligible to utilize a railroad open tariff on the same terms as any other shipper. In *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, 220 U.S. 335, this Court held that a freight forwarder was entitled to railroad service on this basis, and in 1936 the Commission, approving tariffs filed prior to the Motor Car-

riers Act, held that motor carriers could utilize open piggyback tariffs. "We have here a published tariff, and a motor carrier would have the same right to make shipments thereunder as any other member of the body politic." *Trucks on Flat Cars Between Chicago and Twin Cities,* 216 I.C.C. 435, 444.

The Commission made clear that it would have reached the same result had the tariffs been filed after the effective date of the Act. This ruling, contemporaneous with the Act, was fully consistent with the legislative history and scheme. Congress' primary concern was to bring order into the chaotic competitive situation of the motor carrier industry of that time,[31] and particularly to raise motor carrier rates from the uneconomic levels to which they had fallen [32]—not to exclude motor carriers from beneficial participation in bimodal transportation methods like piggyback. In fact, in the first section of the Act Congress declared its policy to be to "improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers" (49 Stat. 543). The subsequently enacted National Transportation Policy repeats and amplifies the congressional goal of coordination of the different transport modes (see pp. 46–51, *supra*)—a goal that requires,

[31] *American Trucking Assns.* v. *United States,* 344 U.S. 298; S. Rep. No. 482, 74th Cong., 1st Sess.; *Report of the Federal Coordinator of Transportation,* S. Doc. No. 152, 73d Cong., 2d Sess.

[32] Hearings to Amend Interstate Commerce Act Before S. Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess., pt. I, p. 64 (testimony of Federal Transportation Coordinator Eastman).

as we have seen, that motor carriers enjoy access to rail piggyback service on the same terms as other shippers.

2. It is true that in 1939 the Commission in dictum deemed it "repugnant to the act" for a motor carrier "to act as a common carrier by motor vehicle and as a shipper by rail as to the same service" (*Substituted Freight Service,* 232 I.C.C. 683, 690).[33] It is likewise true that—although no statutory basis for the dictum was suggested, no legislative history cited, no reasons of policy advanced, and no reference made to the Commission's contrary holding in *Trucks on Flat Cars Between Chicago and Twin Cities, supra*—this dictum was later interpreted, without any additional consideration, to preclude motor carrier usage of railroad piggyback open tariffs. *Movement of Highway Trailers by Rail,* 293 I.C.C. 93, 104. In the present proceeding the Commission carefully considered the dictum of *Substitute Freight Service,* noted that it had been uttered "without explanation or supporting precedent" (322 I.C.C. at 332), and concluded that it was "incorrect in the light of this record and current conditions." 322 I.C.C. at 334. The Commission has, of course, an ongoing responsibility to reexamine its precedents in the light of changed conditions in the transportation industry. Here, it quite properly conducted such a reexamination in a com-

[33] The Commission's holding was merely that the motor carrier's tariffs were legally insufficient in failing to notify the shipper that substituted service was contemplated and to give him an option to insist on all-motor transportation. The Commission's rules here in issue are consistent with this holding since they require that such an option be given. See p. 16, *supra.*

prehensive rulemaking proceeding in which it was able, for the first time, to view the entire piggyback problem upon a complete record. Cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202. We can think of no problem more timely for fresh consideration than piggyback.

Nevertheless, the court below concluded that the dictum was beyond the power of the Commission to disturb. It emphasized that the rule had endured for 25 years. However, it is clear that when cogent reasons and the public interest compel, even a consistent and generally unchallenged administrative practice may, after careful consideration, be overturned. Compare *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315. The court below cited *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968 (S.D. N.Y.), affirmed, 309 U.S. 638, for the proposition that the *Substituted Freight Service* dictum had received a judicial imprimatur. But that decision held only that a motor common carrier could not establish *joint rates* with a freight forwarding company, since Section 216(c) of the Act, 49 U.S.C. 316(c), requires that both parties be regulated common carriers, and forwarders were, at the time, unregulated. The opinion recognizes that forwarders could and did avail themselves of *open tariffs*, and does not intimate that a regulated motor carrier could not.

Finally, the district court gave great weight to the failure of Congress to act upon proposals for express legislation in this area. However, the legislation proposed by the Commission (*e.g.*, S. 3510 and H.R. 1225,

87th Cong., 2d Sess.; S. 676 and H.R. 2088, 88th Cong., 1st Sess.) would have amended Section 216(c) of the Act to give the Commission authority to compel the establishment of motor-rail through routes—a quite different proposition, as we explain below (pp. 59–62), from entitling motor carriers to use the railroads' open tariffs. To be sure, additional legislation, proposed by President Kennedy (see H. Doc. No. 384, 87th Cong., 2d Sess.; S. 3242 and H.R. 11584, 87th Cong., 2d Sess.; S. 1062 and H.R. 4701, 88th Cong., 1st Sess.), would have authorized motor carriers to utilize open tariffs. But the Commission itself indicated that additional legislation might not be necessary to achieve the ends for which it was proposed, and the industry then requested Congress to stay its hand pending completion of the Commission proceeding from which the rules here in issue emerged.[34] See Statement, *supra*, p. 14. In these circumstances, congressional inaction can hardly be construed as indicating doubt of the Commission's authority to promulgate these rules. Furthermore, government agencies must be free to request legislation clarifying or confirming their authority without fear that their request will be treated as a concession that they lack the authority under existing law. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33; *United States* v. *duPont & Co.*, 353 U.S. 586, 590; *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 610.

[34] These requests evidently pertained to the legislation the Commission had proposed as well as that proposed by the President.

3. The court below was also concerned lest the Commission's rules allow a motor carrier to cease providing truck service altogether, by always using railroad trucks for local pickup and delivery (R. 28). There is no such danger. In the first place, a motor carrier that abandoned the highways would violate its duty under Section 204(a)(1) of the Act (49 U.S.C. 304(a)(1)) to provide "continuous and adequate service" and its certificate could be revoked for dormancy (49 U.S.C. 312(a)). The Commission has made it perfectly clear that it is prepared to invoke its powers under these sections to prevent "over-enthusiastic embracing of TOFC service" (322 I.C.C. at 365). Secondly, a motor carrier will normally find it more advantageous to use its own trucks, since the out-of-pocket cost of moving freight with its own equipment is likely to be less than the cost of employing another carrier to do so at rates that reflect both the total costs of, and a profit for, the second carrier. Finally, under the Commission's rules, the motor carrier must preserve the shipper's option of requiring all-truck movement (Rules 3(c), 4(b); 322 I.C.C. at 337, 351), and must provide "safe and adequate service, equipment, and facilities" for this purpose (49 U.S.C. 316(b)).[35]

[35] Also unfounded is the court's concern that the logic of the Commission's rules would "permit a carrier which had received freight from another to exercise the same right by tendering the same freight immediately back to the original carrier" (R. 28), thereby creating an impasse. Since rail rates are ordinarily lower than motor rates for the same line haul, it would not be in the railroad's economic interest to do this except as a device to prevent truckers from using piggyback. Such conduct, deliberately aimed at avoiding a duty of carriage, would violate Section 1(4) of the Act. See p. 28, *supra*.

B. PARTICIPATION BY MOTOR CARRIERS IN RAIL PIGGYBACK SERVICE ON THE SAME TERMS AS ORDINARY SHIPPERS IS WHOLLY UNLIKE THE COMPELLED ESTABLISHMENT OF JOINT THROUGH ROUTES

Section 216(c) of the Interstate Commerce Act (49 U.S.C. 316(c)) permits, but does not compel, motor and rail carriers to establish joint through routes and rates. The court below reasoned (R. 33) that the Commission's rules, in permitting motor carriers to demand piggyback service upon the same terms as ordinary shippers, compel the establishment of joint through routes and hence violate the voluntary feature of Section 216(c). We disagree. These rules do not compel the railroads to offer piggyback service; they in no sense require the establishment of joint through routes—a technical concept under the Act; and Section 216(c) discloses no purpose to prevent the Commission from requiring the railroads to grant equal access to carriers who desire to ship a portion of their freight by rail.

1. The Commission has express power under the Act to compel the establishment of joint through routes and rates between rail carriers [36] and between rail and water carriers.[37] It claims no such power under Section 216(c) with respect to rail and motor carriers. Thus it may not compel a railroad to join with a motor carrier in establishing a joint through route involving piggyback service, or prescribe the rates, terms and conditions of the tariff, or require

[36] 49 U.S.C. 15(4); *Denver & R.G.W.R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321; *Thompson* v. *United States*, 343 U.S. 549; *United States* v. *Great Northern R. Co.*, 343 U.S. 562.

[37] 49 U.S.C. 1(4); *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612.

both the railroad and the motor carrier to provide service on the prescribed route. Nor has it done so in the rules in issue here. They do not require the railroads to offer any open-tariff piggyback service; they do not require motor carriers to use such service if offered; they establish no rates, terms or conditions. They require only that piggyback service, if offered, be made available to all on nondiscriminatory terms. The only compulsion is to abate the discrimination, and this command springs from the antidiscrimination provisions of the Act rather than from any power the Commission claims under Section 216(c) and can be fully complied with by discontinuing open-tariff piggyback services—in which event there could be no contention that the Commission had compelled the establishment of a joint service. It is no answer that the railroads are not likely to find abandonment of open-tariff service an attractive method of compliance. Certainly, the Commission may proscribe discrimination in circumstances where, as a practical matter, the railroad may feel compelled to abate the discrimination rather than discontinue the service. *Larrison* v. *Chicago & Grand Trunk R. Co.*, 1 I.C.C. 147; *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, 220 U.S. 235.

2. Beyond that, a motor carrier's use of an open rail tariff does not constitute the establishment of a through route—voluntary or compulsory. "[T]he test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service." *Thompson* v. *United States*, 343 U.S. 549, 557. See, also, *Denver*

& R.G.W.R. Co. v. *Union Pacific R. Co.*, 351 U.S. 321, 327. Under such an arrangement the rail carrier and the motor carrier jointly publish a tariff whose rates, terms and conditions they have jointly established, and they share in an agreed-upon division of the revenues. The bill of lading may be issued by either carrier, depending upon which originates the shipment. The shipper may hold either carrier liable for overcharges or for loss or damage to the shipment under Section 20(11) of the Act (49 U.S.C. 20(11)). And either carrier may claim over against the other as a connecting carrier under Section 20(12) (49 U.S.C. 20(12)).

The contrast with open-tariff service is marked. In open-tariff service, the shipper contracts only with the motor carrier, ships on its bill of lading and pays only motor carrier tariff rates. There is no holding out by the railroad of service;[38] the shipper can make no claim against the railroad for overcharges or for loss or damage to the shipment; and the railroad has no say whatsoever in the rates, terms or conditions of the motor carrier's tariff or bill of lading and does not share in the trucker's revenues.

When the motor carrier elects to employ open-tariff piggyback service, it is treated by the railroad like any other shipper. The railroad issues a bill of lading to the motor carrier as consignor. The motor carrier pays the same rate and is subject to the same terms and conditions, unilaterally established by the

[38] The shipper is merely advised that, unless he stipulates to the contrary, the motor carrier may, at its option, substitute open-tariff rail piggyback service for a portion of the freight movement.

railroad in its tariff, as any other shipper. It cannot deviate from them, seek special conditions of service, or negotiate a more favorable rate. It cannot claim over against the railroad as a connecting carrier under Section 20(12) for loss or damage to the freight, but must file a shipper's claim under Section 20(11). The owner of the goods is not a party to the railroad's bill of lading and can make no claim against the railroad.

3. Finally, nothing in the history or purpose of Section 216(c) suggests that Congress withheld from the Commission power to compel railroads and motor carriers to establish through routes because it believed that railroads should be permitted to discriminate in the manner that the present rules forbid. The power was withheld solely for a reason peculiar to through routes and inapplicable to piggyback—the fear expressed by some motor carriers that they would be weakened if forced into such arrangements with powerful railroads. 79 Cong. Rec. 5655 (remarks of Senator Wheeler). The Commission's rules do not affect that concern. They do not compel any motor carrier to join in an offer of service with a railroad, or *vice versa*. They neither regulate the terms upon which the motor carrier may ship on the railroad's flatcars nor prescribe divisions of revenue from a piggyback movement in which both a rail and a motor carrier participate. They merely permit the motor carrier, at its option, to ship under certain tariffs.[39]

[39] The court below expressed concern that offering a motor carrier a choice between plan III (open tariff) and plan I (through route and joint rate with the railroad) would create

C. THE COMMISSION'S RULES DO NOT PERMIT MOTOR CARRIERS TO ACT AS FREIGHT FORWARDERS IN VIOLATION OF PART IV OF THE INTERSTATE COMMERCE ACT

The freight-forwarder appellees contend that when a motor carrier utilizes rail piggyback service for the line haul, performing only the pickup and delivery itself, it is acting as a freight forwarder in violation of Section 410(c) of the Interstate Commerce Act, 49 U.S.C. 1010(c), which forbids the Commission to grant a freight-forwarding permit to any carrier subject to the other parts of the Act.[40]

Freight forwarders collect small shipments, consolidate them into truckload or carload lots for movement by a motor or rail carrier at bulk rates, break bulk at a central delivery point, and distribute the component shipments to the consignees. The forwarder charges the shipper the less-than-truckload or less-than-carload rate, but is charged the lower truckload or carload rate by the motor or rail carrier; his profit is the difference. See *Interstate Commerce*

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an unjust discrimination in violation of Section 2, assuming the applicability of that section (R. 28–29). However, divisions obtained by a carrier under a joint rate stand on a different footing from rates charged the shipping public. Under a joint rate, the motor carrier is not purchasing carriage from the railroad but joining in partnership with the railroad to sell shippers a through service. Their division of the income of the partnership is ordinarily of no concern to the shipper, who in any event pays the rate specified in the tariff. See *Louisville & N.R. R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234; compare 49 U.S.C. 1009.

[40] The railroad appellees do not join in this argument since, if accepted, it would preclude the railroads from providing piggyback service to motor carriers even on terms dictated by the railroads.

Commission v. *Delaware, L. & W. R.R.*, 220 U.S. 235; 49 U.S.C. 1002(a)(5). There is inevitably a good deal of overlap between the functions of motor carriers and railroads, on the one hand, and freight forwarders on the other. Since a substantial number of motor carrier shipments are less than truckload, consolidation of small shipments is a very important aspect of a motor carrier's service. Railroads also offer less-than-carload services—and did so long before freight forwarding was a recognized service.

In bringing freight forwarders under the regulatory aegis of the Commission in part IV of the Act, Congress did not intend to preclude motor carriers from performing their traditional pickup and delivery function, albeit it is physically similar to the service performed by freight forwarders. In fact, it expressly exempted any person who performs consolidation, break-bulk, and other services physically similar to a freight forwarder's as a carrier subject to one of the other parts of the Act. 49 U.S.C. 1002(a)(5). Part IV thus does not "apply with respect to transportation performed by * * * motor * * * carriers in accordance with the applicable provisions of the Interstate Commerce Act." H. Rep. No. 1172, 77th Cong., 1st Sess., p. 6.

The background of Part IV is instructive. In 1940, it was held that forwarders, as unregulated carriers, could no longer enter into joint rate arrangements with regulated motor carriers. *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968 (S.D. N.Y.), affirmed, 309 U.S. 638. The forwarders persuaded Congress that unless these arrangements were

legalized they would be forced to discontinue their service to many small communities and shippers—a service constituting almost half their business. See *e.g.*, Hearings on H.R. 3684 before H. Comm. on Interstate and Foreign Commerce, 77th Cong., 1st Sess., p. 29. The forwarders never represented to Congress that they required insulation from the competition of motor-carrier less-than-truckload service, whose physical similarity to and overlap with forwarder service was well known to Congress. Hearings, *supra*, p. 196. And Congress accordingly did not consider or enact any limitations upon motor-carrier competition in this area. If such an intention had emerged in the lengthy hearings on this legislation, it would surely have evoked an objection from the motor carriers,[41] who were then already using substituted piggyback service. *Trucks on Flatcars Between Chicago and Twin Cities*, 216 I.C.C. 435; *Substituted Freight Service*, 232 I.C.C. 683.

Far from invading a preserve of the freight forwarders, the Commission's rules restore a competitive balance between them and the motor carriers that had been disturbed by the preclusion of motor carriers from free access to piggyback service. Forwarders are permitted to utilize railroad piggyback open tariffs. *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 111. They are also permitted to quote trailer-load rates, and compete for such business with the motor carriers, although their traditional functions of assembly, consolidation, break-bulk

[41] The motor carriers supported the legislation. Hearings, *supra*, pp. 197–198.

and distribution are not performed in such shipments and their traditional small customers are not involved. *Eastern Express, Inc.* v. *United States,* 198 F. Supp. 256 (S.D. Ind.), affirmed, 369 U.S. 37. Before the intensive development of piggyback in the 1950's, the forwarders' business apparently flourished despite competition from motor-carrier less-than-truckload service. The extension of the same piggyback service now enjoyed by the forwarders to the motor carriers thus should not in any way affect the competitive balance between these transport modes with respect to the traditional business of the forwarders. It merely restores motor carriers to a position of competitive equality with respect to *their* traditional business.

Nor is there any danger that the rules enable the motor carriers to become freight forwarders in disguise. A motor carrier may offer substituted rail service only as an incident to its authorized service and only with respect to routes covered by its certificate. These routes are ordinarily much more limited than those of freight forwarders, who generally enjoy broad regional or national authority. In addition, the motor carrier must hold out to the shipper the option of complete over-the-highway service and be prepared to furnish it. Finally, any abandonment of the highways or excessive embracing of piggyback service by a motor carrier would, as we have seen (*supra,* p. 58), expose it to severe sanctions that the Commission is fully prepared to apply.

CONCLUSION

The judgment below should be reversed and the Commission's rules in issue sustained.

Respectfully submitted.

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APPENDIX

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The National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding Section 1, provides:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service and of the national defense. All of the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(4) of the Interstate Commerce Commission Act, 49 U.S.C. 1(4), provides:

> (4) *Duty to furnish transportation and establish through routes; division of joint rates.*
>
> It shall be the duty of every common carrier subject to this chapter to provide and furnish

transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 2 of the Interstate Commerce Commission Act, 49 U.S.C. 2, provides:

§ 2. *Special rates and rebates prohibited.*

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Section 3(1) of the Interstate Commerce Commission Act, 49 U.S.C. 3(1), provides:

> § 3. *Preferences; interchange of traffic; terminal facilities.*
>
> (1) *Undue preferences or prejudices prohibited.*
>
> It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 12(1) of the Interstate Commerce Commission Act, 49 U.S.C. 12(1), provides:

> § 12. *Authority and duties of Commission; witnesses; depositions.*
>
> (1) *Authority, duties, and proceedings of Commission, witnesses.*
>
> The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a

common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is authorized and required to execute and enforce the provisions of this chapter; and, upon the request of the Commission, it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this chapter the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Section 216(c) of the Interstate Commerce Commission Act, 49 U.S.C. 316(c), provides:

(c) *Through routes and joint rates; "common carriers by water".*

Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by

railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. As used in this subsection the term "common carriers by water" includes water common carriers subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act of 1933, as amended (including persons who hold themselves out to transport goods by water but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and through routes and joint rates so established and all classifications, regulations, and practices in connection therewith shall be subject to the provisions of this chapter.

Section 402(a)(5) of the Interstate Commerce Commission Act, 49 U.S.C. 1000(2)(a)(5), provides:

(5) The term "freight forwarder" means any person which (otherwise than as a carrier subject to chapters 1, 8, or 12 of this title) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of

break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapters 1, 8, or 12 of this title.

Interstate Commerce Commission Rules 500.1–500.3 (Supp. 1966) provide:

49 CFR 500. *Practices of for-hire carriers participating in trailer-on-flatcar service*

500.1 *Definition of TOFC service.*—Trailer-on-flatcar (TOFC) service means the transportation on a rail car, in interstate or foreign commerce, of (*a*) any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis); or (*b*) any empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidental to its prior or subsequent use in TOFC service as defined in subparagraph (*a*) of this section.

500.2 *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

500.3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.*—

(*a*) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(*b*) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the [redacted] of their services to direct that in any particular instance TOFC service not be utilized.

(*c*) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(*d*) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

(*e*) Motor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve.

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